SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 999 84

O. B. WILLIAMS AND LILLIE SHAVER HENDRIX,
Petitioners,

vs.

THE STATE OF NORTH CAROLINA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND BRIEF IN SUPPORT THEREOF.

W. H. STRICKLAND,
Counsel for Petitioners.

INDEX.

Subject Index.

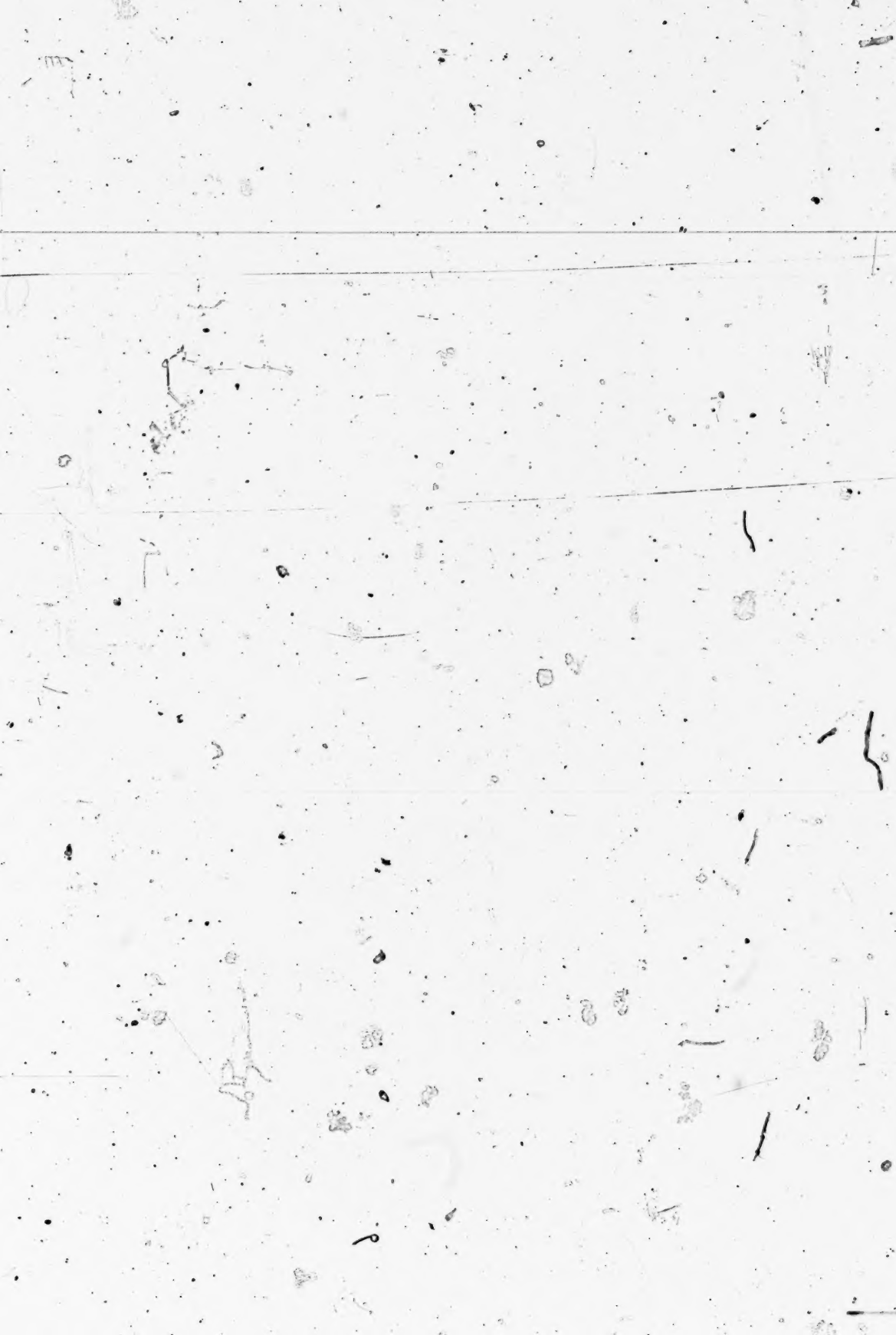
	Page
Petition for writ of certiorari	1
Summary of matter involved	1
Jurisdiction	4
Prayer for writ	6
Brief in support of petition	7
Jurisdiction	7
Social importance of the question involved	11
Conclusion	13

Table of Cases Cited.

Atherton v. *Atherton*, 181 U. S. 155	9
Bell v. *Bell*, 181 U. S. 175, 45 L. Ed. 804	12
Cole v. *Cunningham*, 33 L. Ed. 538	11
Davis v. *Davis*, 83 L. Ed. —	8
Hanna v. *Hanna*, 224 Mo. App. 1142, 32 S. W. (2d) 125	9
Janssen v. *Janssen*, 269 Ill. App. 233	9
Loughran v. *Loughran*, 78 L. Ed. 1219	8
McKisson v. *McKisson*, 154 Sou. 618	9
Miller v. *Miller*, 200 Iowa 1193	9
Pahy v. *Pahy*, 107 N. J. Eq. 538, 153 At. 519	9
Palmer v. *Palmer*, 265 Mass. 242	9
Williams v. *North Carolina*, 87 L. Ed. 279	2, 3, 6, 7, 8
Yerys v. *New York Life Insurance Co.*, 210 N. C. 442	7, 8

Statutes Cited.

North Carolina Code, Sec. 4342	10
United States Constitution, Article 4, Sec. 1	4, 7, 8
Article 4, Sec. 2	5, 11
Amendment V	3, 6
Amendment XIV	3, 4, 5, 6, 10



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vs.

THE STATE OF NORTH CAROLINA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA AND BRIEF IN SUPPORT THEREOF.

Summary

Your petitioners, O. B. Williams and Lillie Shaver Hendrix, (the names under which your petitioners were indicted) petition this Honorable Court for a writ of certiorari to issue to the Supreme Court of North Carolina, and would respectfully show:

That your petitioners were indicted in the Superior Court of Caldwell County, North Carolina, under a bill of indictment as appears in the record (R. 3) charging the crime of bigamous cohabitation; that your petitioners were citizens and residents of the State of Nevada and had been so adjudged by certain decrees of a Court of competent

jurisdiction in said State of Nevada (R. 22 and 35). That upon adjudication that the bona fide residence of your petitioners was in the State of Nevada, your petitioners procured a judgment of absolute divorce from their respective spouses (R. 22 and 35) in a court of competent jurisdiction in the State of Nevada, your petitioner, O. B. Williams procuring service of summons and complaint under and by virtue of the statute in the State of Nevada providing for service of process in a foreign state in actions *in rem* or *quasi in rem* by the sheriff of the county and state of the residence of the defendant; the former spouse of Lillie Shaver Hendrix having signed a card (R. 48) agreeing to accept service of process when the same was forwarded to him and he having fled to the State of Ohio, actual service was had upon him by publication. Upon rendition of a decree of absolute divorce, which decree restored the petitioners to the status of single persons in the State of Nevada, your petitioners intermarried with each other in the State of Nevada and in full accordance with the laws of the State of Nevada and subsequently thereto came to the State of North Carolina when and where they were indicted for bigamous cohabitation. That your petitioners were first tried in the Superior Court of Caldwell County at the February Term, 1941, and upon a verdict of guilty by the jury, were given prison terms as appear of record. That your petitioners appealed to the Supreme Court of North Carolina, which Court upheld the convictions (220 N. C. 445). The United States Supreme Court allowed petition for writ of certiorari and upon hearing of said cause reversed the opinion of the Supreme Court of North Carolina (87 L. Ed. 279). The Supreme Court of North Carolina subsequent to the decision by this Honorable Court ordered a new trial of your petitioners in the Superior Court of Caldwell County, North Carolina, that the Supreme Court

of North Carolina refused to recognize the opinion of the United States Supreme Court and in addition thereto failed and refused to assign any error either in its own opinion or the opinion of the United States Supreme Court (220 N. C. 609) but simply ordered a new trial.

That your petitioners when said cause was again called for trial in the Superior Court of Caldwell County, North Carolina, entered a plea of former jeopardy which plea was overruled and your petitioners reserved exceptions. That your petitioners were again convicted of the alleged crime of bigamous cohabitation and again appealed to the Supreme Court of North Carolina. That the Supreme Court of North Carolina on April 12, 1944 filed an opinion affirming the conviction of your petitioners, which opinion is contrary to the opinion of the United States Supreme Court in this identical case as appears in 87 L. Ed. 279.

That your petitioners in the trial court relied upon the following Federal questions:

1. That the Courts of North Carolina when Federal questions are involved, are bound by the decisions of the United States Supreme Court which decision in this identical case as reported in 87 L. Ed. 279, the North Carolina Supreme Court entirely disregarded.

2. That your petitioners further relied upon the plea of former jeopardy, there having been no error assigned either by the United States Supreme Court or the North Carolina Supreme Court, your petitioners relying upon the provisions of Amendment V to the United States Constitution.

3. Your petitioners further relied upon the provisions of Amendment XIV to the United States Constitution to the effect that the statute under which your petitioners are indicted is unconstitutional by reason of said Amendment

XIV, for the reason that the statute exempts persons who have been lawfully divorced from their former spouses and under the interpretation placed thereon by the Supreme Court of North Carolina that tribunal attempts to say whether divorce decrees rendered by the State of Nevada are illegal and void or whether such decrees are valid.

4. The defendants further relied upon the full faith and credit clause of the United States Constitution to-wit; Article 4, Section 1 providing "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may enact general laws prescribing the manner in which such acts, records and proceedings shall be proved and the effect thereof."

Jurisdiction

This Court has jurisdiction to review the opinion of the Supreme Court of North Carolina for the reason that it involves the following distinct Federal questions.

1. The defendants having been heretofore tried and convicted by a jury in the Superior Court of Caldwell County and that conviction having been affirmed by the Supreme Court of North Carolina and on petition for writ of certiorari to the United States Supreme Court the judgment of the North Carolina Supreme Court having been reversed and no new trial ordered, the defendants' plea of former jeopardy as appears of record is available to them.

2. The North Carolina Supreme Court is bound by the decisions of the United States Supreme Court when Federal questions are involved.

3. That the State of North Carolina is required under and by virtue of Article 4, Section 1 of the United States Constitution to give the same faith and credit to the divorce

decrees regular on their face and the marriage of the defendants as is accorded to said decrees and marriage in the state of their rendition, to-wit; the State of Nevada.

4. That under Article 4, Section 2 of the United States Constitution providing that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states these defendants, having been heretofore duly adjudged bona fide citizens of the State of Nevada, that the Courts of North Carolina cannot in view of the provisions of the United States Constitution above set forth decree what shall be a lawful or unlawful divorce and marriage in a foreign state, the State of North Carolina having offered no evidence challenging or impeaching the adjudication of the question of fact as to the bona fide residence of the defendants in the State of Nevada upon the grounds of fraud or lack of jurisdiction or any other grounds.

5. Your petitioners having been legally divorced pursuant to the laws of the state of their residence or domicile and having intermarried with each other pursuant to the laws of said state, cannot by virtue of the provisions of Amendment XIV to the Constitution of the United States be convicted for bigamy or bigamous cohabitation upon moving from the state of their domicile or residence into North Carolina or any other state.

The foregoing constitutional questions were duly presented to the Supreme Court of North Carolina by both the record exceptions and the brief of your petitioners but that the Supreme Court of North Carolina held that it was not bound under the full faith and credit clause to give full faith and credit to the Nevada divorce decrees. The Supreme Court of North Carolina further held that it had the right, even in the absence of evidence, to infer that the Nevada divorce decrees were a sham and a fraud. The

Supreme Court of North Carolina further held that Section 4342 of the North Carolina Code was not in violation of Amendment XIV to the United States Constitution. The Supreme Court of North Carolina further held that your petitioners' plea of former jeopardy under Amendment V of the United States Constitution was not available to them.

That the other questions raised in the brief by your petitioners in the North Carolina Supreme Court were not passed upon.

That your petitioners further show the Court that it is not possible for them to file a petition to re-hear said cause in the Supreme Court of North Carolina and that the opinion of the Supreme Court of North Carolina, as appears of record is the final judgment therein.

That your petitioners believe that the decision of the Supreme Court of North Carolina upholding the conviction of your petitioners for the alleged crime of bigamous cohabitation is contrary to the opinion of this Honorable Court in the identical case of *O. B. Williams, et al.* v. *The State of North Carolina* as reported in 87 L. Ed. 279.

Wherefore it is respectfully prayed that this petition for a writ of certiorari be allowed and that the writ be granted to review the judgment and opinion of the Supreme Court of North Carolina; and your petitioners will ever pray.

W. H. Strickland,
Attorney for Petitioners,
Lenoir, North Carolina.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The opinion of the Supreme Court of North Carolina sought to be reviewed, is reported in 224 North Carolina, Page 183, and appears in the record filed herein beginning on page 106 and continuing through page 117.

Jurisdiction.

1. Your petitioners further contend that in the former hearing of this cause by the United States Supreme Court that there was no error assigned and no new trial ordered, but that the Court reversed outright the opinion of the North Carolina Supreme Court and that the North Carolina Supreme Court attempted to "vacate" its judgment which had already been reversed by the United States Supreme Court and without the assignment of any error whatsoever ordered a new trial of this cause of action which constitutes former jeopardy, your petitioners relying upon the provisions of Amendments V to the United States Constitution.

2. Your petitioners contend that the State of North Carolina is bound, when Federal questions are involved, by the decisions of the United States Supreme Court. That the United States Supreme Court decided this identical case as reported in 87 L. Ed. page 279; and that this Court reversed the former decision of the North Carolina Supreme Court. That the North Carolina Supreme Court refused to follow the directions of the United States Supreme Court but, on the contrary, ordered a new trial of these petitioners which again resulted in a conviction upon the identical evidence that was produced by the State at the first trial and which evidence was before the United States Supreme Court in the first hearing, your petitioners relying upon Article 4, Section 1 of the United States Constitution and upon *Yerys* v. *New York Life Insurance Company*,

210 North Carolina, 442. The North Carolina Supreme Court held in the latter case that matters passed upon by the United States Supreme Court are res judicata.

"3. Your petitioners further relied upon Article 4, Section 1, of the Constitution of the United States providing that full faith and credit shall be accorded the judicial decrees of a sister state when those decrees have been rendered in accordance with the laws of the state where rendered. In *Williams et al. v. North Carolina*, 8[illegible] L. Ed. 279, this identical case was passed upon by the United States Supreme Court and it was there held that North Carolina must give full faith and credit to the Nevada divorce decrees involved in this controversy.

In *Davis v. Davis*, 83 L. Ed., the United States Supreme Court held:

> "'28 U. S. C. A., Sec. 687, declares that judicial proceedings authenticated as there provided shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the State from which they are taken. Thus Congress rightly interpreted the clause to mean not some but full credit . . . the acts extended the rule of the Constitution to all courts, Federal as well as State.'"

Likewise in *Loughran v. Loughran*, 78 L. Ed. 1219, it is held:

> "Marriages, not polygamous or incestuous or otherwise declared void by statute, will, if valid by the law of the state where entered into, be recognized as valid in every other jurisdiction.
>
> "Courts of the District of Columbia are bound, equally with the courts of the states, to observe the command of the full faith and credit clause.
>
> "If a marriage is valid in the state in which it is contracted its validity will be recognized in another state

so as to entitle the woman to dower in the lands in the latter state although the marriage would not have been valid as contracted in such state."

In *Atherton* v. *Atherton*, 181 U. S. 155, this Court held:

"A decree of divorce based upon notice pursuant to state laws is entitled to faith and credit in the courts of another State."

In *Jansson* v. *Jansson*, 269 Ill. App. 233, it was held where a party to divorce proceedings in a sister state has brought suit upon constructive service and established a bona fide residence in such state and the suit is free from any fraud, the courts of Illinois will give full faith and credit to the decree of such other state.

In *Miller* v. *Miller*, 200 Iowa 1193, foreign divorce decrees are held to be entitled to full faith and credit.

In *McKisson* v. *McKisson*, 154 Sou. 618, the Louisiana courts held that the courts of one state cannot ignore divorce decrees rendered in another state.

In *Palmer* v. *Palmer*, 265 Mass. 242, it was held that non residents of the state who married outside of the state though violative of the restrictions of the state of the forum were entitled to have such marriages recognized in the state of the forum.

In *Hanna* v. *Hanna*, 224 Mo. App. 1142 (32 SW 2d. 125) it was held that a divorce decree rendered in another state *and not proven to have been obtained by fraud or collusion is entitled to recognition.*

Paby v. *Paby*, 107 NJEQ. 538 (153 Atlantic 519) it was held that where the court rendered the decree of divorce if it had jurisdiction of the subject matter its adjudication that the complainant or plaintiff in the divorce action was a bona fide resident was conclusive and final and binding upon all the courts.

4. Your petitioners further relied upon the provisions of Amendment XIV, Section 1, of the United States Constitution which provides:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

It is conceded that your petitioners were duly divorced under the laws of the State of Nevada prior to their marriage in the State of Nevada. It is also conceded that your petitioners are first citizens of the United States. The courts in Nevada received evidence upon the good faith of your petitioners' residence in the State of Nevada and upon the finding of fact that your petitioners were bona fide residents, your petitioners contend that the State of North Carolina is bound thereby. Moreover the State of North Carolina offered no evidence challenging the jurisdiction of the Nevada courts or challenging the legality of the divorce decrees rendered by the State of Nevada nor did the State of North Carolina offer any evidence impeaching said judgments for fraud. The State of North Carolina contended itself by resting upon exactly the same evidence adduced in the first trial of this cause. Your petitioners therefore contend that to put the construction upon Section 4342 of the North Carolina Code, which the North Carolina Supreme Court has done, constitutes an unlawful extension of the legislative powers of the State of North Carolina. The pertinent provisions of Section 4342, among other things, provides that that statute shall not apply to persons who have been lawfully divorced. To sustain the conviction of your petitioners, the North Carolina Supreme Court has to, in effect, hold that the Nevada divorce decrees were and are unlawful. Your petitioners believe that the North Carolina Supreme Court cannot extend the legislative powers of the State of North Carolina to the State of Nevada and by its interpretation of the statute involved

say when a foreign divorce decree is legal or illegal. Your petitioners also relied upon Article 4, Section 2, of the United States Constitution.

In *Cole v. Cunningham*, 33 L. Ed. 538 it was held with respect to the privileges and immunities clause:

> "The intention of this clause was to confer on the citizens of the several states a general citizenship and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances, and this includes the right to institute actions."

It is not contended by the State of North Carolina that your petitioners were not legally divorced and legally married under the laws of the State of Nevada, but they simply say that they are not required to recognize, by virtue of the full faith and credit clause, a Nevada divorce decree.

Social Importance of the Question Involved

To apply the interpretation to the statute involved and under which your petitioners were indicted which the North Carolina Supreme Court has applied would tend to freeze the citizenship within the boundary of each respective state. At the present time there are literally thousands of soldiers and defense workers located in North Carolina who have come from other states and without a doubt there are many among them who have been divorced and remarried in other states. Under North Carolina's interpretation of the statute, all of such persons who have been divorced and remarried in some other state and have removed to North Carolina for whatever purpose, either as a soldier or to a defense project, could be indicted, convicted and sentenced to prison for long periods of time. Obviously, such a statute denies to the citizens of the several states the privileges and immunities guaranteed by the United States Constitution. To uphold the opinion of the North Carolina Supreme

Court and create the intolerable situation of having people legally divorced and legally married in one state and living in bigamy in another state, would bastardize the children of the second marriage for literally thousands of people and create a situation where such children would be legitimate in one state and illegitimate in another and in still another their status would be unknown. In addition thereto it would upset property rights which have been vested in children of second marriages throughout the country.

It is now high time that the Supreme Court of the United States pass upon the constitutionality of the North Carolina statute under which these defendants are indicted to the end in view that if said statute be determined unconstitutional that there will be an end to the unjust persecution which your petitioners have endured.

The State of North Carolina in its second opinion relied upon *Bell* v. *Bell* 181 U. S. 175, 45 L. Ed. 804, in affirming a verdict of guilty on the second trial. *Bell* v. *Bell* has absolutely no application to the case at bar. In *Bell* v. *Bell* the suit was instituted by a New York resident in the State of Pennsylvania and when the decree of divorce rendered by the courts of Pennsylvania came under attack, the party attacking said decree was able to show by the defendant's own affidavit for the probate of a will in the State of New York a short time prior to the rendering of the decree of divorce in the State of Pennsylvania, that the defendant was at that time a citizen and resident of the State of New York. Obviously, when the party attacking a divorce decree has not become a citizen and resident of the state rendering the decree, and neither has the party procuring such decree and that is shown by defendant's own testimony in the form of an affidavit, the court was justified in finding as a fact that he was not a bona fide citizen and resident of the state attempting to dissolve the

bonds of matrimony. However, in the case at bar, the State of North Carolina, as has heretofore been said, offered no evidence showing the lack of residence or bona fide domicile in the State of Nevada which would impeach in any manner the decrees of the Nevada courts. In addition to this, *Bell* v. *Bell* involves a right of action *in personam* rather than a right of action *in rem*. There is a decided and distinct difference in the nature of the two separate actions.

The North Carolina Supreme Court failed to distinguish this difference and therefore based its present decision upon *Bell* v. *Bell* since *Haddock* v. *Haddock* was previously overruled by the United States Supreme Court.

Conclusion.

Symmetrically and logically stated the proposition is this:

The petitioners, in good faith, established their residence in Nevada in accordance with the laws of Nevada and in good faith and with notice to their former sponses, obtained legal divorce decrees in the State of Nevada. They, in good faith, intermarried in the State of Nevada after having met all the requirements of the laws of the State of Nevada.

Can the State of North Carolina successfully prosecute your petitioners a second time, in spite of their plea of former jeopardy, when they have been legally divorced and legally married in a sister state in view of the safeguards guaranteed citizens of the United States by the Constitution of the United States?

Respectfully submitted,

W. H. Strickland,
Lenoir, North Carolina.

BRIEF FOR THE PETITIONER

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 84

O. B. WILLIAMS AND LILLIE SHAVER HENDRIX,
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vs.

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BRIEF FOR PETITIONERS

W. H. STRICKLAND,
Counsel for Petitioners.

INDEX.

SUBJECT INDEX.

	Page
Syllabus of brief	1
Statement of jurisdiction	3
Statement of case	5
Assignment of errors	6
Argument	19
Divorce decrees were granted with due process in accordance with the United States Constitution and in accordance with the laws of Nevada	20
Plea of former jeopardy	20
North Carolina bound by United States Supreme Court	22
Divorce decrees regular on their face cannot be collaterally attacked except for fraud	23
Facts once litigated by a court of competent jurisdiction cannot be again litigated in the courts of another state	24
Divorce action is an action in rem	27
Action for divorce being one in rem service by publication is valid	27
North Carolina courts under Article IV, Section I of the Constitution of the United States are required to give full faith and credit to the Nevada decrees	28
The petitioners having been adjudged bona fide citizens of the State of Nevada are entitled to all privileges and immunities guaranteed by Article IV, Section II of the Constitution of the United States	31
The North Carolina statute involved in this action, to-wit Appendix I, herein is unconstitutional	31
Discussion of Bell v. Bell	33
Question of domicile	35
The court's charge	38
Social Aspects of the question involved	39
Appendix I—Section 4342 of the North Carolina Code	44

Page

Appendix II—Section 484 of the North Carolina Code. 44
Appendix III—Nevada Law—Section 8582—Service of Process outside of Nevada—when by publication 45

TABLE OF CASES CITED.

Atherton v. *Atherton*, 181 U. S. 155 2, 29
Ball v. *U. S.*, 41 L. Ed. 300 1, 20
Bell v. *Bell*, 181 U. S. 175 33
Cardinale v. *Cardinale*, C. P. 2d. 351 29
Christmas v. *Russell*, 5 Wall. 290 21
Cole v. *Cunningham*, 33 Fed. 538 2, 31
Commonwealth, ex rel. Cronhardt v. *Cronkardt*, 193 A. 484 29
Connolly v. *Union Sewer Pipe Co.*, 46 L. Ed. 679 2, 32
Connor v. *Elliott*, 15 L. Ed. 497 2, 31
Cope v. *Cope*, 196 A. 422 29
Davis v. *Davis*, 305 U. S. 32, 83 L. Ed. 26 2, 21
Ditson v. *Ditson*, 4 R. I. 87 27
Duffer v. *Brunson*, 125 S. E. 619, 188 N. C. 789 2, 23
Eure v. *Paxton*, 80 N. C. 17 2, 23
Faris v. *Hope*, 298 F. 727 2, 28
Fauntleroy v. *Lum*, 210 U. S. 230 21
Ferrell v. *St. Paul*, 64 N. W. 809 27
Freet v. *Holdorf*, 205 Io. 1081 27
Frey v. *Frey*, 58 F. 2d 1046 2, 28
Garner v. *Garner*, 56 Md. 127 2, 27
Gassert v. *Strong*, 38 Mont. 18 2, 28
Gildersleeve v. *Gildersleeve*, 88 Conn. 689 2, 27
Gould v. *Crow*, 57 Mo. 200 27
Hampton v. *McConnel*, 3 Wheat. (U. S.) 234 21
Harding v. *Harding*, 49 L. Ed. 1066 2, 24
Hood v. *Hood*, 110 Mass. 463 27
Johnson v. *Whilden*, 88 S. E. 223, 171 N. C. 153 23
Keenan v. *Keenan*, 40 Nev. 351 27
Kendrick v. *Kendrick*, 188 Mass. 550 2, 27
Kenney v. *Supreme Lodge, L. O. M.*, 252 U. S. 411 21
Kirby v. *Kirby*, 55 P. 2d. 356 29
Loughran v. *Loughran*, 292 U. S. 216 2, 29
Magnolia Petroleum Co. v. *Hunt*, 88 L. Ed. 161 2, 21
Miller v. *Miller*, 200 Iowa, 1193 27, 29
Millikan v. *Meyer*, 85 L. Ed. 278 2, 28

	Page
Milwaukee County v. *M. E. White Co.*, 296 U. S. 268	21
Page v. *Baker*, 76 N. Y. 78	2,27
Pennoyer v. *Neff*, 95 U. S. 714	2,20,28
Ratcliff v. *The State of Texas*, 278 S. W. 1072	2,32
Renner v. *Renner*, 181 A. 191	29
Spillman v. *Williams*, 91 N. C. 483	23
State v. *Williams, et al*, 224 N. C. 183	6
Stocks v. *Stocks*, 179 N. C. 285, 102 S. E. 306	2,23
Titus v. *Wallick*, 306 U. S. 282	22
Voorhies v. *Voorhies*, 166 So. 121	29
Wade v. *Dick*, 36 N. C. 313	2,23
Williams, et al v. *North Carolina*, 87 L. Ed. 379, 317 U. S. 287	1,3,19,22
White v. *Glover*, 116 N. Y. S., 1059	28
Wood v. *Sugg*, 91 N. C. 93, 49 AM REP., 639	2,23
Yerys v. *New York Life Insurance Co.*, 210 N. C. 442 (1936)	1,22

STATUTES CITED.

Constitution of the United States, Fourteenth Amendment	2,4,31,35
Constitution of the United States, Amendment V	33,38
Constitution of the United States, Article 4, Section 1.	1,22
Section 687, North Carolina Code (Appendix III) 28 U. S. C. A. 687	29,30
Constitution of North Carolina, Article 1, Section 11	33
Appendix I	38
Section 4342, North Carolina Code	2,5,42

TEXTS CITED.

19 Corpus Juris, p. 179, sec. 445	26
19 Corpus Juris, p. 370, sec. 836	30
34 Corpus Juris, p. 1127, sec. 1603	2,24
34 Corpus Juris, p. 1135, sec. 1611	26
28 C. J. S., p. 11, sec. 6	3,35
28 C. J. S., p. 11, sec. 9	3,35
28 C. J. S., p. 14, sec. 10	3
28 C. J. S., p. 14, sub-sec. b sec. 10	37
28 C. J. S., p. 17, sub-sec. c sec. 11	37
Vreeland on "Validity of Foreign Divorce Decrees," 1938, p. 25	39

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No. 84

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BRIEF FOR PETITIONERS.

Syllabus of Brief.

Your petitioners having been once convicted in the Superior Court of Caldwell County and that conviction having been affirmed by the North Carolina Supreme Court and the opinion of that Court having been reversed by the Supreme Court of the United States, without the assignment of any errors, the petitioners' plea of former jeopardy is available. *Bull* v. *United States*, 41 L. Ed. 300; *Williams* v. *North Carolina*, 317 U. S. 287.

North Carolina is bound by the decisions of the United States Supreme Court when Federal questions are involved. *United States Constitution*, Article 4, Section 1; *Yerks* v. *New York Life Insurance Company*, 210 N. C. 442.

1*a*

Divorce decrees regular on their face cannot be collaterally attacked except for fraud. *Wade* v. *Dick*, 36 N. C. 313; *Eure* v. *Paxton*, 80 N. C. 17; *Duffer* v. *Brunson*, 188 N. C. 789; *Wood* v. *Sugg*, 91 N. C. 93; *Stocks* v. *Stocks*, 179 N. C. 285.

Facts once litigated by a court of competent jurisdiction cannot be again litigated in the courts of another state. *Magnolia Petroleum Company* v. *Hunt*, 88 L. Ed. 461; *Harding* v. *Harding* 49 L. Ed. 1066; 34 *Corpus Juris*, Page 1127, Section 1603.

Divorce action is an action *in rem*. *Garner* v. *Garner*, 56 Md. 127; *Page* v. *Baker*, 76 N. Y., 78; *Gildersleeve* v. *Gildersleeve*, 88 Conn. 689; *Kendrick* v. *Kendrick*, 188 Mass. 550.

Action for divorce being one *in rem*, service by publication is valid; *Pennoyer* v. *Neff*, 95 U. S. 714; *Gassert* v. *Strong*, 38 Mont. 18; *Millikan* v. *Meyer*, 85 L. Ed. 278.

North Carolina, under the full faith and credit clause of the Constitution of the United States, is required to give full faith and credit to Nevada divorce decrees regular on their face. *Farris* v. *Hope*, 298 F. 727; *Frey* v. *Frey*, 58 F. 2d 1046; *Davis* v. *Davis*, 83 L. Ed. 26; *Loughran* v. *Loughran*, 292 U. S. 216; *Atherton* v. *Atherton*, 181 U. S. 155.

The petitioners having been adjudged bona fide citizens of the State of Nevada are entitled to all privileges and immunities granted by Article 4, Section 2 of the *United States Constitution; Connor* v. *Elliott*, 15 L. Ed. 497; *Cole* v. *Cunningham*, 33 Fed. 538.

Section 4342 (Appendix I) of the North Carolina Code is unconstitutional in that it attempts to invade the privileges and immunities of citizens of other states contrary to the constitution of the United States. Amendment XIV of the *Constitution of the United States; Connolly* v. *Union Sewer Pipe Company* 46 L. Ed. 679; *Ratcliff* v. *State of Texas*, 289 S. W. 1072.

Bell v. *Bell*, which the North Carolina Supreme Court relied on for its second opinion, has no application to the case at bar for the reason that the party procuring the divorce in that instant had never been a resident of the State of Pennsylvania.

The State of North Carolina having attacked the domicile of your petitioners in the State of Nevada it was incumbent upon the State to offer evidence supporting its attack. 28 C. J. S., Section 6, page 11; 28 C. J. S., Section 9, page 11; 28 C. J. S., Section 10, page 14; C. J. S., Section 11, page 17.

To uphold the opinion of the North Carolina Supreme Court would be to upset property rights and declare children born to a second union illegitimate and otherwise embarrass the children of such second unions. *Williams, et al* v. *North Carolina*, 87 L. Ed. 279.

Statement of Jurisdiction.

This Court has jurisdiction to review the opinion of the Supreme Court of North Carolina for the reason that it involves the following distinct Federal questions.

1. The defendants having been heretofore tried and convicted by a jury in the Superior Court of Caldwell County and that conviction having been affirmed by the Supreme Court of North Carolina and on petition for writ of certiorari to the United States Supreme Court the judgment of the North Carolina Supreme Court having been reversed and no new trial ordered, the defendants' plea of former jeopardy as appears of record is available to them.

2. The North Carolina Supreme Court is bound by the decisions of the United States Supreme Court when Federal questions are involved.

3. That the State of North Carolina is required under and by virtue of Article 4, Section 1 of the United States Constitution to give the same faith and credit to the divorce

decrees regular on their face and the marriage of the defendants as is accorded to said decrees and marriage in the state of their rendition, to-wit; the State of Nevada.

4. That under Article 4, Section 2 of the United States Constitution providing that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states these defendants, having been heretofore duly adjudged bona fide citizens of the State of Nevada, that the Courts of North Carolina cannot in view of the provisions of the United States Constitution above set forth decree what shall be a lawful or unlawful divorce and marriage in a foreign state, the State of North Carolina having offered no evidence challenging or impeaching the adjudication of the question of fact as to the bona fide residence of the defendants in the State of Nevada upon the grounds of fraud or lack of jurisdiction or any other grounds.

5. Your petitioners having been legally divorced pursuant to the laws of the state of their residence or domicile and having intermarried with each other pursuant to the laws of said state, cannot by virtue of the provisions of Amendment XIV to the Constitution of the United States be convicted for bigamy or bigamous cohabitation upon moving from the state of their domicile or residence into North Carolina or any other state.

The foregoing constitutional questions were duly presented to the Supreme Court of North Carolina by both the record exceptions and the brief of your petitioners but that the Supreme Court of North Carolina held that it was not bound under the full faith and credit clause to give full faith and credit to the Nevada divorce decrees. The Supreme Court of North Carolina further held that it had the right, even in the absence of evidence, to infer that the Nevada divorce decrees were a sham and a fraud. The Supreme Court of North Carolina further held that Section 4342 of the North Carolina Code was not in violation of Amendment XIV to the United States Constitution. The Supreme Court of North Carolina further held that your

petitioners' plea of former jeopardy under Amendment V of the United States Constitution was not available to them.

The court also has jurisdiction by virtue of the allowance of the petition for certiorari granted on June 12, 1944.

Summary of Case.

Your petitioners, O. B. Williams and Lillie Shaver Hendrix (the names under which your petitioners were indicted), respectfully show unto the Court that the said O. B. Williams and Lillie Shaver Hendrix established a bona fide residence in the State of Nevada and that such residence was adjudged to be bona fide (See R. 21 & 22), and upon such adjudication were duly awarded a decree of divorce, after fully complying with the due process clause of the Federal Constitution, and the laws of the State of Nevada, from their respective spouses, by a court of competent jurisdiction in the State of Nevada. Subsequent to the rendition of the decree of divorce, your petitioners intermarried with each other in the State of Nevada and in full accordance with the laws of that State. Subsequent to their intermarriage with each other, your petitioners removed to the State of North Carolina and the State of North Carolina, under Section 4342 of the North Carolina Code, defining the alleged crime of bigamous cohabitation (See Appendix I), indicted your petitioners.

That your petitioners were first tried before His Honor, H. Hoyle Sink, who imposed long prison terms upon your petitioners. That your petitioners appealed to the Supreme Court of North Carolina, which judgment was affirmed. That upon the affirmation of said judgment, your petitioners applied for writ of certiorari to the Supreme Court of the United States, which petition was granted. That pursuant to the petition granted in that case, the cause was argued in the Supreme Court of the United States at the October

Term, 1942, when and where the United States Supreme Court reversed the Supreme Court of North Carolina and held that North Carolina would be obliged to give full faith and credit to the Nevada divorce decrees involved in this action.

That subsequent thereto, the Supreme Court of North Carolina, in its effort to overrule the Supreme Court of the United States, attempted to "vacate" its judgment, which had already been reversed by the United States Supreme Court, and attempted to order a new trial without the assignment of any errors whatsoever.

The trial Court of Caldwell County retried the case over the objections of the defendants and over their plea of former jeopardy.

Upon the second trial of your petitioners in the Superior Court of Caldwell County, the jury again returned a general verdict of guilty. When and where His Honor, S. J. Ervin, Jr., imposed prison sentences as appear of record (R. 4 & 5).

Your petitioners again appealed to the Surpeme Court of North Carolina, which Court affirmed the judgment of the lower court, and that decision is reported under the style name of *State* v. *Williams, et al.*, 224 N. C. 183. That your petitioners again petitioned the United States Supreme Court for writ of certiorari, which writ was granted June 12, 1944, and is reported in 88 L. Ed. 1184.

Assignment of Errors.

Assignment of Error No. 1: Your petitioners and each of them assign as error the action of the Court in overruling their special appearances and motion to dismiss under their plea of former jeopardy. (R. 77).

Assignment of Error No. 2: Your petitioners and each of them assign as error the action of the Court in overruling

their motion to set aside the verdict of the jury for the reasons stated in said motion, (R. 78).

Assignment of Error No. 3: Your petitioners and each of them assign as error the refusal of the court to allow their motion in arrest of judgment for the reason that Section 4342, under which your petitioners were indicted, tried, and convicted, is unconstitutional by virtue of the Fourteenth Amendment to the United States Constitution (R. 79).

Assignment of Error No. 4: Your petitioners and each of them assign as error the judgment entered against them imposing prison sentences for the reason that said judgment is contrary to the former decision of the United States Supreme Court in this identical case, (R. 79).

Assignment of Error No. 5: Your petitioners and each of them assign as error the refusal of the court to allow their motion for judgment as of nonsuit at the close of the State's evidence, which judgment was renewed at the close of all of the evidence and which motion raised the question (a) of the full faith and credit clause of the United States Constitution; (b) the constitutionality of Section 4342 of the North Carolina Code; (c) that the adjudication by a court of competent jurisdiction in Nevada upon the question of the good faith of the residence of your petitioners in that State was *res judicata*, (R. 79).

Assignment of Error No. 6: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters E to F, (R. 79), which is as follows:

> "Where the State seeks the conviction of an accused upon a charge of bigamous cohabitation, the State has the burden of proving beyond a reasonable doubt from the evidence four facts, namely: (1) That the accused

was lawfully married to one person; (2) That thereafter the accused contracted a second marriage with another person outside of North Carolina; (3) That the spouse of the accused by the former marriage was living at the time the second marriage was contracted by the accused outside of North Carolina; (4) That after contracting the second marriage outside of North Carolina, the accused cohabited in North Carolina with the person with whom he had contracted such second marriage.

When these four facts are shown by the State beyond a reasonable doubt from the testimony in a prosecution for bigamous cohabitation, the State has made out what the law calls a prima facie case, and is not bound to go further and prove that the former marriage has not been dissolved by divorce, knowledge as to such dissolution being peculiarly within the cognizance of the accused."

Assignment of Error No. 7: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters G to H, (R. 79), which is as follows:

When the State proves the four facts enumerated by the Court as constituting a prima facie case beyond a reasonable doubt from the testimony, "the burden then devolved upon the accused to satisfy the trial jury, not beyond a reasonable doubt nor by the greater weight of the evidence, but simply to satisfy the trial jury from facts or circumstances offered in evidence either by the State or by the accused or by a co-defendant, that the accused was lawfully divorced from his first spouse at the time of his second marriage, if the accused in the prosecution for bigamous cohabitation relies upon the dissolution of his first marriage by divorce as a defense."

Assignment of Error No. 8: Your petitioners and each of them assign as error that portion of the court's charge

embraced within the letters I to J, (R. 79), which is as follows:

> "The Court instructs you that in the prosecution of the defendant, O. B. Williams, upon the charge of bigamous cohabitation, the law casts upon the State the burden of showing four things beyond a reasonable doubt from the evidence, in order to constitute a prima facie case as against the defendant, O. B. Williams. These four things are as follows: (1) That the defendant, O. B. Williams, a man, was lawfully married to Mrs. O. B. Wike Williams, a woman, before the times named in the bill of indictment; (2) That after his marriage to Mrs. O. B. Wike Williams, namely, on or about the 4th day of October, 1940, the defendant, O. B. Williams, contracted a marriage with the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, a woman, in the State of Nevada; (3) That at the time the defendant, O. B. Williams, contracted the alleged marriage with Lillie Shaver Hendrix or Lillie Shaver Williams, in the State of Nevada, Mrs. O. B. Wike Williams, his wife by his former marriage, was still living; and (4) That after the defendant, O. B. Williams, contracted the alleged marriage with his co-defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, in the State of Nevada, the defendant, O. B. Williams, and his co-defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, cohabited together in the State of North Carolina."

Assignment of Error No. 9: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters K to L, (R. 80), which is as follows:

> "If the State, however, should satisfy you beyond a reasonable doubt from the evidence in this case that each and every one of these four things existed in the case of O. B. Williams, then it would be your duty to return a verdict finding the defendant, O. B. Williams

guilty of bigamous cohabitation, as charged in the bill of indictment, unless the defendant O. B. Williams should satisfy you from facts or circumstances offered in evidence either by the State or by himself or by his co-defendant, that at the time of his alleged marriage to his co-defendant in the State of Nevada, he was lawfully divorced from the bond of his former marriage to Mrs. O. B. Wike Williams, and to do that, upon such finding being made by you, the defendant, O. B. Williams, would have to satisfy you from facts or circumstances offered in evidence, either by the State or by himself or by his co-defendant, that at the time the Eighth Judicial District Court of the State of Nevada in and for Clark County entered the decree of divorce in the suit therein instituted between Otis B. Williams and his alleged first wife, Mrs. O. B. Wike Williams, the defendant, O. B. Williams, had his domicile in the State of Nevada."

Assignment of Error No. 10: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters M to N, (R. 80), which is as follows:

"and if the defendant O. B. Williams, should satisfy you from facts or circumstances in evidence that at the time the Court in Nevada rendered the alleged decree of divorce set forth in the certified copy of the record from the State of Nevada that he, O. B. Williams, had his domicile in the State of Nevada, then it would be your duty to return a verdict of not guilty as to the defendant, O. B. Williams."

Assignment of Error No. 11: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters O to P, (R. 80), which is as follows:

"and if the defendant, O. B. Williams, should fail to satisfy you from facts or circumstances in evidence that at the time of the rendition of the alleged decree of di-

vorce in the suit between O. B. Williams and his alleged first wife, Mrs. O. B. Wike Williams, in the State of Nevada, the defendant, O. B. Williams, was domiciled in the State of Nevada, then it would be your duty to return a verdict of guilty as to the defendant, O. B. Williams."

Assignment of Error No. 12: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters Q to R, (R. 80), which is as follows:

"That after the marriage between Tom Hendrix and the defendant Lillie Shaver Hendrix or Lillie Shaver Williams, namely on or about the 4th day of October, 1940, the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams contracted a marriage with her co-defendant, O. B. Williams, a man, in the State of Nevada."

Assignment of Error No. 13: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters S to T, (R. 80), which is as follows:

"If the State, on the contrary, however, should satisfy you beyond a reasonable doubt from the testimony that each and every one of those four things enumerated by the court co-existed with respect to the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, then it would be your duty to return a verdict finding the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, guilty of bigamous cohabitation, unless the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, should satisfy you, not beyond a reasonable doubt nor by the greater weight of the evidence, but simply satisfy you from facts or circumstances offered in evidence either by the State or by herself or by her co-defendant, that at the time of her alleged marriage to her co-defendant, O. B. Williams, in the

State of Nevada, she was lawfully divorced from the bond of her alleged first marriage to Tom Hendrix, and do that, upon such a finding being made by you, the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, would have to satisfy you from facts or circumstances offered in evidence that at the time the Eighth Judicial District Court of the State of Nevada in and for Clark County rendered the alleged decree of divorce in a suit therein pending between Lillie Shaver Hendrix or Lillie Esther Hendrix and Thomas George Hendrix, the defendant Lillie Shaver Hendrix or Lillie Shaver Williams had her domicile in the State of Nevada."

Assignment of Error No. 14: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters U to V, (R. 80), which is as follows:

"therefore the State is not required to prove beyond a reasonable doubt from the testimony that a person entering into an alleged first marriage had the capacity to contract such marriage."

Assignment of Error No. 15: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters W to X, (R. 80), which is as follows:

"Now, the Court has told you that the defendants are charged with what is known in law as bigamous cohabitation and during the course of its charge, the court has used and will use the word cohabitation because the statute provides that one of the essential elements of bigamous cohabitation is that the accused must cohabit in the State of North Carolina with the person with whom he is alleged to have contracted a second marriage outside of North Carolina."

Assignment of Error No. 16: Your petitioners and each of them assign as error that portion of the court's charge

embraced within the letters Y to Z, (R. 81), which is as follows:

> "and that on one or more occasions one of the defendants stated in the presence of the other that they were married to each other, and that on one occasion the feme defendant stated that she was now Mrs. Williams."

Assignment of Error No. 17: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters AA to BB, (R. 81), which is as follows:

> "but such recitation does not compel you to make such an inference, for you may find from the evidence that notwithstanding such recitation, the defendant Lillie Shaver Hendrix or Lillie Shaver Williams was not in fact or in truth domiciled in Nevada. The same rule applies to the recitations in the record of the proceeding instituted in Nevada by the defendant, O. B. Williams, and the court here charges you that the recitation in such record to the effect that the defendant O. B. Williams was and was found to be a bona fide resident of Nevada for more than six weeks immediately preceding the institution of his action for divorce constitutes prima facie evidence that the defendant, O. B. Williams was a bona fide resident of Nevada domiciled in Nevada at the times recited. By this it is meant that such recitation is sufficient of itself to warrant your finding that the defendant O. B. Williams was a bona fide resident of Nevada domiciled in Nevada at the times recited in such recitation, but such recitation does not compel you to make such finding, for you may find that notwithstanding such recitation the defendant O. B. Williams was not in fact domiciled in the State of Nevada."

Assignment of Error No. 18: Your petitioners and each of them assign as error that portion of the court's charge

embraced within the letters CC to DD, (R. 81), which is as follows:

> "and that Caldwell County, North Carolina, was the domicile of O. B. Williams and Mrs. O. B. Wike Williams."

Assignment of Error No. 19: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters EE to FF, (R.81), which is as follows:

> "The State contends that you ought to find that the two defendants left their fixed homes in Caldwell County, North Carolina, and went to Nevada simply and solely for the purpose of securing divorces in Nevada and with the purpose at all times of returning to North Carolina as soon as they obtained such divorces."

Assignment of Error No. 20: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters GG to HH, (R. 81), which is as follows:

> "but never in the State of Nevada insofar as the evidence discloses."

Assignment of Error No. 21: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters II to JJ, (R. 82), which is as follows:

> "The State contends that it has shown you as to each defendant beyond a reasonable doubt the four essential elements necessary to make out a prima facie case as against each of the defendants and insists that you cannot be satisfied that at the time of their marriage to each other in Nevada that the defendants or either of them had been lawfully divorced from their respective spouses by their former marriages. The State

contends that the defendants were domiciled in North Carolina and went to Nevada merely for the purposes of securing divorces and that they intended at all times to return to North Carolina as soon as they obtained such divorces and that they did return to North Carolina pursuant to their intentions as soon as they obtained divorce decrees."

Assignment of Error No. 22: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters KK to LL, (R. 82), which is as follows:

"The Court instructs you that if you should be satisfied from the evidence beyond a reasonable doubt that each and every one of the following four elements existed with respect to the defendant, O. B. Williams, namely:

1. That the defendant, O. B. Williams, a man, was lawfully married to Mrs. O. B. Williams, a woman, before the times named in the bill of indictment;

2. That after the marriage between the defendant, O. B. Williams and Mrs. O. B. Wike Williams, namely on the 4th day of October, 1940, the defendant, O. B. Williams contracted a marriage with the defendant, Lillie Shaver Hendrix, a woman, in the State of Nevada;

3. That at the time the defendant, O. B. Williams, contracted the alleged marriage with Lillie Shaver Hendrix or Lillie Shaver Williams, in the State of Nevada, Mrs. O. B. Wike Williams, his wife by a former marriage, was still living;

4. That after the defendant, O. B. Williams, contracted the alleged marriage with his co-defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, in the State of Nevada, the defendant, O. B. Williams, and his co-defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, cohabited together in the State of North Caro-

lina, then you will return a verdict finding the defendant, O. B. Williams, guilty of bigamous cohabitation, as charged in the bill of indictment, unless the defendant, O. B. Williams, satisfied you from facts or circumstances offered in evidence either by the State or by himself or by his co-defendant that at the time the Eighth Judicial District Court in the State of Nevada in and for Clark County granted a decree of divorce in his suit against Mrs. O. B. Wike Williams, he was domiciled in the State of Nevada."

Assignment of Error No. 24: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters MM to NN, (R. 82), which is as follows:

"If the State should satisfy you beyond a reasonable doubt from the evidence in the case that all four of the essential elements enumerated by the Court as being necessary to constitute a prima facie case as against the defendant, O. B. Williams, existed with respect to the defendant, O. B. Williams, and if the defendant, O. B. Williams, should fail to satisfy you from facts or circumstances in the evidence that at the time the Eighth Judicial District Court in the State of Nevada rendered the decree of divorce in his favor in his suit against Mrs. O. B. Wike Williams, he was domiciled in the State of Nevada, then it would be your duty to return a verdict of guilty as to the defendant, O. B. Williams.

If the State should satisfy you beyond a reasonable doubt from the evidence in this case that each and every one of the four essential elements enumerated by the Court as necessary to constitute a prima facie case as against the defendant, O. B. Williams, existed with respect to the defendant, O. B. Williams, and if the defendant, O. B. Williams, has satisfied you from the facts and circumstance offered in evidence, either by the State or by himself or by his co-defendant, that at the time the Eighth Judicial District Court in the State of Nevada in and for Clark County rendered a

decree of divorce in his favor and against Mrs. O. B. Wike Williams, he was domiciled in the State of Nevada, then you would return a verdict of not guilty as to the defendant, O. B. Williams."

Assignment of Error No 24: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters OO to PP, (R. p. 84), which is as follows:

"The Court instructs you, however, that if the State has satisfied you from the evidence in the case beyond a reasonable doubt that these four essential elements existed as to the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, namely:

1. That the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, a woman, was lawfully married to Tom Hendrix, a man, before the times named in the bill of indictment;

2. That after the marriage between the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, and Tom Hendrix, namely on or about the 4th day of October, 1940, the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams contracted a marriage with her co-defendant, O. B. Williams, in the State of Nevada;

3. That at the time the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, contracted a marriage with her co-defendant, O. B. Williams, in the State of Nevada, Tom Hendrix, her husband by a former marriage, was still living;

4. That after the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams contracted the alleged marriage with her co-defendant, O. B. Williams, in the State of Nevada, the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, and her co-defendant, O. B. Williams, cohabited together in the State of North Carolina,—then you will return a verdict finding the defendant, Lillie Shaver Hendrix or Lillie Shaver

Williams, guilty as charged in the bill of indictment, unless the defendant Lillie Shaver Hendrix or Lillie Shaver Williams satisfied you, not beyond a reasonable doubt nor by the greater weight of the evidence, but simply satisfies you from facts or circumstances offered in evidence, either by the State or by herself or by her co-defendant, that at the time the Eighth Judicial District Court of the State of Nevada in and for Clark County, Nevada, rendered the decree of divorce in her favor in her suit against Tom Hendrix or Thomas George Hendrix, that she was domiciled in the State of Nevada."

Assignment of Error No. 25: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters QQ to RR, (R. p. 84), which is as follows:

"The Court instructs you that if the State has satisfied you beyond a reasonable doubt from the evidence in this case that each and every one of the four elements enumerated by the Court as being necessary to constitute a prima facie case as against the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, existed as to such defendant, and if the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, has failed to satisfy you from facts or circumstances in evidence that she was domiciled in the State of Nevada in and for Clark County, Nevada, rendered a decree of divorce in her favor in her suit against Tom Hendrix or Thomas George Hendrix, then you will return a verdict finding the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, guilty as charged in the bill of indictment."

Assignment of Error No. 26: Your petitioners and each of them assign as error that portion of the court's charge embraced within the letters SS to TT, (R. p. 84), which is as follows:

"If the State has satisfied you beyond a reasonable doubt from the evidence in this case that each and

every one of the four elements enumerated by the Court as being necessary to constitute a prima facie case as against the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, and if the defendant, Lillie Shaver Hendrix or Lillie Shaver Williams, has satisfied you from facts or circumstances in evidence that she was domiciled in the State of Nevada at the time the Eighth Judicial District Court of the State of Nevada in and for Clark County, Nevada, rendered a decree of divorce in her favor in her suit against Tom Hendrix or Thomas George Hendrix, then you will return a verdict finding the defendant, Lillie Shaver Hendrix or Lillie Shaver *Hendrix*, not guilty."

Argument.

It is to be observed that in the former hearing on certiorari, in the identical case of *Williams, et al.* v. *North Carolina*, 87 L. Ed. 279, the State of North Carolina, through its duly constituted representatives, admitted that the evidence appearing of record was sufficient to establish at least a colorable bona fide residence in the State of Nevada on the part of your petitioners. It is inconceivable that on the second trial of this cause of action that the State of North Carolina will be permitted to retract its former admission and take the position that there is no evidence appearing of record establishing the bona fides of the residence of your petitioners in the State of Nevada and especially so in view of the fact that the second trial was had upon the identical evidence which was received in the first trial and upon the identical bill of indictment upon which these petitioners were first tried.

Divorce Decrees Were Granted With Due Process in Accordance With the United States Constitution and in Accordance With the Laws of Nevada.

(See *Pennoyer* v. *Neff*, 95 U. S. 714 and Appendix III Hereto Attached.)

Plea of Former Jeopardy.

Your petitioners, in the second trial of this cause of action relied upon their plea of former jeopardy under Amendment V to the United States Constitution which provides, among other things, as follows, to-wit: "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

In *Ball* v. *U. S.*, 41 L.-Ed. 300, the facts were that Ball, along with other persons, was indicted for murder. The bill of indictment was fatally defective, but the persons were tried upon that bill of indictment. Ball was acquitted and upon an appeal to the United States Supreme Court by the other defendants, it was held that the bill of indictment was fatally defective. Upon a new presentment and a new bill of indictment, Ball was again indicted for murder. The court held that his plea of former jeopardy must be allowed despite the fact that the original bill of indictment was fatally defective.

In the case at bar, the defendants did not ask for or procure a new trial for any error committed by the trial court or by the Supreme Court of North Carolina, but asked for an outright reversal under the pertinent provisions of the fundamental law of the land, which prayer was granted by this Honorable Court. This Court ordered no new trial and assigned no error, except that North Carolina was obliged, under the full faith and credit clause, to give full recognition to the Nevada divorce decrees when they appeared to be regular on the face thereof and no evidence

was offered by the State impeaching said decrees. Therefore, your petitioners believe, argue, and contend that the North Carolina Supreme Court was without any jurisdiction to "vacate" its opinion, which had theretofore been reversed by the Supreme Court of the United States, and that the action of the Supreme Court of North Carolina in "vacating" its opinion and ordering a new trial of your petitioners before the jury in the Superior Court of Caldwell County was and is a complete nullity and without foundation in the law.

After diligent search, your petitioners have been unable to locate any decision involving Federal questions where a State Supreme Court has completely disregarded the action of the United States Supreme Court and again placed the defendant on trial upon the identical bill of indictment and the identical evidence which had theretofore been lifigated through the highest court in the land and a judgment rendered by said court in favor of your petitioners. In *Christmas* vs. *Russell* 5 Wall. 290, it is held, "Where the jurisdiction has attached, the judgment is conclusive for all purposes and is not open to inquiry upon the merits."

In the most recent case of *Magnolia Petroleum Company* vs. *Hunt*, 88 L. Ed. 161, Mr. Chief Justice Stone, writing for the Court, said "From the beginning this Court has held that these provisions have made that which has been adjudicated in one state res judicata to the same extent in every other", citing the folowing cases for that position.

Hampton v. *M'Connel*, 3 Wheat. (U. S.) 234, 235, 4 L. Ed. 378, 379; *Christmas* v. *Russell*, 5 Wall. (U. S.) 290, 18 L. Ed. 475; *Fauntleroy* v. *Lum*, 210 U. S. 230, 52 L. Ed. 1039, 28 S. Ct. 641; *Kenney* v. *Supreme Lodge, L. O. M.*, 252 U. S. 411, 64 L. Ed. 638, 40 S. Ct. 371; 10 ALR 716; *Milwaukee County* v. *M. E. White Co.*, 296 U. S. 268, 80 L. Ed. 220, 56 S. Ct. 229; *Davis* v. *Davis*, 305 U. S. 32, 40; 83 L. Ed.

26, 29, 59 S. Ct. 3, 118 ALR 1518; *Titus* v. *Wallick*, 306 U. S. 282, 291, 292, 83 L. Ed. 653, 659, 660, 59 S. Ct. 557; *Williams* v. *North Carolina*, 317 U. S. 287, 87 L. Ed. 279, 63 S. Ct. 207, 143 ALR 1273, supra.

North Carolina Bound by United States Supreme Court.

It has heretofore been a recognized principle of the law and the profession as relied upon the principle to the effect that state courts, when Federal questions are involved, are bound by the decisions of the United States Supreme Court. Article 4, Section 1 of the United States Constitution, among other things, provides as follows: "Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state."

Indeed North Carolina has, up until the appearance of the case at bar before it, recognized this fundamental principle.

In the case of *Yerys* v. *New York Life Insurance Company*, 210 N. C. 442 (1936) where the question involved was whether or not the State Supreme Court was bound by the adjudication of a question of fact by the Circuit Court of Appeals, the Court held: "The defense of invalidity is not available to the defendant in the present action, neither is it entitled to be heard again on the question of reformation or cancellation nor on the subject of its counterclaim. These matters were considered in a forum of its own choosing. They are now *res judicata* • • • it is a familiar maxim that a man shall not be twice vexed for the same cause. If a final judgment or decree is rendered, the parties cannot again be heard upon any matter which was then litigated and determined, the controversy having passed *in rem judicatam* and become conclusive between the parties."

Divorce Decrees Regular on Their Face Cannot Be Collaterally Attacked Except for Fraud.

In *Wade* v. *Dick*, 36 N. C. 313, it is held: "Jurisdiction having once been acquired over the parties and the subject matter, every presumption is in favor of the legality of the judgment."

In *Eure* v. *Paxton*, 80 N. C. 17, it is held: "A final decree rendered by a court of competent jurisdiction can be impeached only in a direct proceeding for that purpose."

It is respectfully submitted that in the case at bar, the State of North Carolina would be obliged to file a motion in the cause for the impeachment of the Nevada decrees involved in this controversy in order to impeach such judgments. See *Buffer* v. *Brunson*, 125 S. E. 619, 188 N. C. 789.

In *Wood* v. *Sugg*, 91 N. C. 93, 49 Am. Rep. 639 where the question of the adjudication of a dower right had been decided by final judgment, the North Carolina Supreme Court held that the heirs at law were estopped to impeach the judgment entered therein.

And in *Johnson* v. *Whilden*, 88 S. E. 223, 171 N. C. 153, the North Carolina Supreme Court held a judgment of the court having jurisdiction of the parties and of the subject-matter cannot be attacked collaterally.

In *Stocks* v. *Stocks*, 179 N. C. 285, 102 S. E. 306, the Court held: "A decree of a court having jurisdiction in a proceeding in all respects regular on its face as to parties, canot be attacked collaterally."

In *Spillman* v. *Williams*, 91 N. C. 483, it is held: "An irregularity in making service by publication affords no ground for a collateral impeachment of the judgment."

It is therefore respectfully submitted that when the State of North Carolina considered the legality of the Nevada divorce decrees involved in this controversy, it was incum-

bent upon the State, since the decrees were regular on their face, to offer some evidence supporting its challenge and until such evidence was offered by the State of North Carolina which was worthy of belief, the State of North Carolina was bound under the full faith and credit clause to give, not some, but full recognition to the judgments of the courts of Nevada dissolving the bonds of matrimony between your petitioners and their respective ex-spouses.

Facts Once Litigated by a Court of Competent Jurisdiction Cannot Be Again Litigated in the Courts of Another State.

Christmas v. *Russell, supra; Magnolia Petroleum Company* v. *Hunt, supra.*

It is to be observed that the plaintiffs in error were adjudged to be bona fide citizens of the State of Nevada (See R. 85 & 86). This finding of fact by the Nevada Court of competent jurisdiction was not attempted to be impeached in the trial of this cause. Such finding of fact is conclusive and binding upon the courts of the State of North Carolina and cannot be collaterally attacked. In *Harding* v. *Harding*, 49 L. Ed. 1066, this Court held that a final decree in chancery is as conclusive as a judgment at law and that the courts of one State must allow to a judgment of a sister State the same effect that it has in the State where rendered.

In 34 *Corpus Juris*, page 1127, Section 1603, the following is stated to be the law:

> The judgment of a court of one State, when sued on, pleaded or introduced in evidence in another State, is entitled to receive the same faith, credit, and respect that is accorded to it in the State where rendered, so that if valid and conclusive there, it is so in all other States. But a judgment from another State is entitled to no greater effect or finality than would be accorded to it in the State where

rendered; and hence if it would there be inconclusive, impeachable, or re-examinable, it will receive no greater consideration or measure of finality in other States. "*The validity and effect of a judgment must therefore be determined by reference to the laws of the State where it was rendered. If a judgment is valid in the State where it is rendered, it will be given full faith and credit in another State, without inquiring whether the domestic courts would or could have rendered such a judgment, whether such a judgment would have been valid under the local laws, or whether the court rendering the judgment was right or wrong in the interpretation and application of the laws of its own State, or even in its reading and application of the laws of the State where the judgment is brought in question. The rule has been held to apply, although the cause of action or statute upon which the judgment is based is against the law and public policy of the State or territory in which enforcement is sought.*" Also the judgment will be accorded the effect given it in the State of its rendition, although a similar judgment of a home tribunal would not have the same effect. On the other hand, it has been held that a judgment of a sister State will be disregarded if to enforce and recognize such judgment would in effect nullify the obligations imposed by law in the State of the forum between citizens thereof. For the purpose of determining the laws of the State where the judgment was rendered it is held in some of the states that the Courts of one State may take judicial notice of the laws of another State; but this doctrine is not generally accepted. On the contrary, it is held that laws of a foreign State must be proved as facts, and if there is no evidence in regard to the laws of the State where the judgment was rendered, the court where it is sought to be enforced will presume that those laws are the same as the laws of its own State, and will give effect to the judgment accordingly.

In 19 Corpus Juris, page 179, Section 445, where the law deals particularly with the status of persons, it is held;

Except as to the subsequent status of the parties, that is, that they are no longer husband and wife, a decree is conclusive of the matters determined only when it is set up against a party to the divorce suit; but it does not settle the status of their prior relations so as to render them valid as to the whole world regardless of whether or not they were so in fact. In New York a decree of divorce is binding on a corespondent who appears and contests the allegations of adultery, notwithstanding he is afterward placed in default, but otherwise if he has not appeared.

In 34 Corpus Juris, page 1135, Section 1611, it is held:

A judgment rendered in another State by a court having jurisdiction is conclusive not only as to all matters which were actually in issue and decided in that suit, or which were necessarily implied in, or to be inferred from the judgment; in the sense that the judgment could not have been rendered without the finding or determination of such matters, but also as to other matters which the parties might have litigated and which might have been decided as incident to, or essentially connected with, the subject matter of the litigation within the purview of the original action, either as a matter of claim or of defense. Even if the second suit is for a different cause of action, the right, question, or fact once so determined must, as between the same parties or their privies, be taken as conclusively established so long as the judgment in the first suit remains unmodified. But a judgment is not conclusive as to any matters which might have been brought into the litigation, or causes of action which plaintiff might have joined, but which in fact were neither joined nor embraced by the pleadings.

Divorce Action Is an Action in Rem.

The plaintiffs in error contend that it is universal law that an action for divorce is one *in rem* affecting the marital status only and that such action being an action *in rem* substituted service is universally recognized as a legal and proper way to confer jurisdiction of the status upon the court rendering the decree when one of the parties is a bona fide citizen and within the jurisdiction of such court. Divorce actions have been held to be actions *in rem* in the following cases:

Garner v. *Garner*, 56 Md. 127; *Hood* v. *Hood*, 110 Mass., 463; *Ferrell* v. *St. Paul*, 64 N. W., 809 (Minn.); *Gould* v. *Crow*, 57 Mo. 200; *Page* v. *Baker*, 76 N. Y., 78; *Ditson* v. *Ditson*, 4 R. I., 87; *Gildersleeve* v. *Gildersleeve*, 88 Conn. 689; *Miller* v. *Miller*, 200 Io. 1193; *Freet* v. *Holdorf*, 205 Io. 1081; *Kendrick* v. *Kendrick*, 188 Mass. 550; *Keenan* v. *Keenan*, 40 Nev. 351; and indeed North Carolina recognizes a divorce action to be an action *in rem* (see Appendix H), in that said State of North Carolina authorizes by the statute set forth as Appendix H the granting of a divorce upon service by publication.

Action for Divorce Being One in Rem Service by Publication Is Valid.

The distinction between an action *in personam* and an action *in rem* is that in the first instance a judgment rendered operates so as to require the party against whom same is rendered to do some personal act. Obviously in such a case actual and personal service must be had. But in the latter case, that is an action *in rem*, the judgment does not operate against the person of the defendant but serves

only to affect the "thing" in litigation. In a divorce action the decree entered affects only the marital status and does not operate as a judgment *in personam*.

In *Pennoyer* v. *Neff*, 95 U. S. 714, it is held that substituted service in an action *in rem* or *quasi in rem* is a valid service if authorized by the laws of the forum. To the same effect is *Gassert* v. *Strong*, 38 Mont. 18, *White* v. *Glover*, 116 N. Y. S. 1059.

Likewise the case of *Millikan* v. *Meyer*, 85 L. Ed. 278, holds that service by publication in actions *in rem* or *quasi in rem* is valid.

North Carolina Courts under Article IV, Section I of the Constitution of the United States Are Required to Give Full Faith and Credit to the Nevada Decrees.

Addressing ourselves to Assignment of Error 5, it is to be observed that under the criminal procedure of North Carolina a motion for judgment as of nonsuit at the close of the State's testimony, which motion is renewed at the close of all of the testimony, raises all the legal questions Federal as well as state which may be and were argued upon such motion.

By the overwhelming weight of authorities throughout the United States, it is held that a judgment rendered in one State, pursuant to and in accordance with the laws of that State, shall be recognized and given full faith and credit in every other State in the union when the same has been duly authenticated in accordance with the acts of Congress. In *Faris* v. *Hoge*, 298 F. 727, it was held that a decree of divorce will be given the same effect in any court within the United States as it is given in the jurisdiction where rendered. Then in *Frey* v. *Frey*, 58 F.

2d, 1046, the court held that if a divorce decree was valid in the jurisdiction where the same was rendered then it is valid everywhere. *Davis* v. *Davis*, 83 L. Ed. 26, which is a recent case, held that if the decree of divorce was valid in the jurisdiction rendering it, it must be recognized, upheld and given full force and effect in every other jurisdiction. The decision in *Davis* v. *Davis* affirms the principle laid down in *Loughran* v. *Loughran*, 292 U. S. 216. This principle was first adopted by the United States Supreme Court in the case of *Atherton* v. *Atherton*, 181 U. S. 155. A divorce action being an action affecting only the *res*, that is the marital status, and having been once adjudicated, it becomes *res judicata* and a bar to subsequent suit for the same relief. *Kirby* v. *Kirby*, 55 P. 2d 356; *Voorhies* v. *Voorhies*, 166 So. 121; *Cope* v. *Cope*, 196 A. 422. The foregoing is generally recognized to be the law regardless of the place of the marriage. *Voorhies* v. *Voorhies*, *supra*.

In *Cardinale* v. *Cardinale*, 68 P. 2d 351, and *Miller* v. *Miller*, 200 Iowa 1193; *Commonwealth ex rel. Cronhardt* v. *Cronhardt*, 193 A. 484, it is held that where a decree of divorce is regular on its face it is presumed to be valid in all respects. Following this presumption it is held in the same case and in *Renner* v. *Renner*, 181 A. 191, that the burden of proof in the face of a divorce decree regular upon its face rests upon the parties attacking such decree.

It is to be observed that in the case at bar no evidence of any kind was offered by the State of North Carolina attacking the divorce decrees in question for any reason or upon any ground.

Title 28, U. S. C. A. section 687 is the Congressional Enactment providing the manner in which judicial proceedings of another State may be authenticated. The Legislature of North Carolina has adopted that Congressional Enactment

and Appendix III, section 687 of the North Carolina Code is as follows:

> "The acts of the legislature of any state or territory, or of any country subject to the jurisdiction of the United States, shall be authenticated by having the seals of such state, territory, or country affixed thereto. The records and judicial proceedings of the courts of any state or territory, or of any such country, shall be proved or admitted in any other court within the United States, by the attestation of the clerk, and the seal of the court annexed, if there be a seal, together with a certificate of the judge, chief justice, or presiding magistrate, that the said attestation is in due form. And the said records and judicial proceedings, so authenticated, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are taken."

It is to be observed that there is no law in North Carolina prohibiting citizens in North Carolina from migrating to other States and there establishing bona fide residence and avail themselves of the divorce laws of that State. 19 Corpus Juris, section 836, page 370, we find the following to be stated as a general proposition of law:

> "There is no rule of law, however, which prevents one from changing his domicile in order to facilitate his obtaining a divorce or to secure other advantages he may think that the laws of the new domicile may afford him; he is free to change at his pleasure, providing the change is a bona fide one and a divorce so acquired will be recognized in the State of his former domicile."

There certainly can be no question of fraud in the instant case since one of the parties was served with process by the sheriff of Caldwell County pursuant to a statute duly enacted in Nevada providing for such method of service, which statute is set forth as Appendix III.

The Petitioners Having Been Adjudged Bona Fide Citizens of the State of Nevada Are Entitled to All Privileges and Immunities Guaranteed by Article IV, Section II of the Constitution of the United States.

The Nevada Court received evidence upon the good faith of the residence of the petitioners and upon that evidence adjudged that the petitioners were bona fide residents.

In *Conner* v. *Elliott*, 15 L. Ed. 497, the court held that the privileges secured by this clause of the Federal Constitution were those privileges belonging to citizenship. It is observed that citizenship in the United States is paramount to citizenship in individual States. Otherwise there could be no solidity of the union. Should it be determined that citizens owe their first allegiance to the various States and a secondary allegiance to the United States then it is conceivable that such an attitude among the people generally would eventually result in a disruption of a union and the establishment of forty-eight or more separate and independent countries, and no question exists which would lead more readily to such a situation than the question of marriage and divorce. It is of the utmost importance that this Court adopt the principle of law that a divorce action is one *in rem*, and that service by publication is valid insofar as it affects the marital relationship of the parties. To like effect is the case of *Cole* v. *Cunningham*, 33 Fed. 538.

The North Carolina Statute Involved in This Action, To-wit, Appendix I, Herein Is Unconstitutional.

Said statute is unconstitutional in that under the court's construction thereof, it extends the legislative powers of the State of North Carolina into the State of Nevada and by judicial interpretation attempts to legislate what shall be a legal divorce and a legal marriage in the State of Nevada.

In Amendment XIV of the Constitution of the United States, it is provided among other things as follows: "No

State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."

It cannot be doubted and is not questioned that the petitioners were citizens of the United States. It cannot be doubted that their residence in the State of Nevada was bona fide since the court received evidence upon that question and adjudicated that the petitioners were bona fide residents and the State of North Carolina offered no evidence challenging that adjudication. If the petitioners were bona fide residents, which up until now has not been questioned by competent evidence, then the Courts of Nevada had the right to render a binding decree of divorce and likewise the Courts of Nevada had the right to issue marriage license and determine when the petitioners were legally married in that State.

In the case of *Connolly v. Union Sewer Pipe Company*, 46 Lawyers Edition 679, this Court held that the State has undoubtedly the power by appropriate legislation to protect the public health and public safety, if, by their necessary operations, its regulations looking to either of these ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void.

It is to be observed that the North Carolina statute involved, to-wit, Appendix I, creates a crime unknown to the common law without any regard to the intent of the parties and said statute is therefore unconstitutional. In *Ratcliff v. The State of Texas*, 289 S. W. 1072, it is held that a statute creating an offense from an act without respect to the intention of the parties is unconstitutional and invalid.

The petitioners further contend that the statute, to-wit, Appendix I, under which they are indicted, does not apply to them for the reason that under the specific terms of said

statute, persons lawfully divorced are not within the provision of said statute; that the legality of their divorce obtained in Nevada pursuant to and in accordance with the laws of Nevada, has not been challenged or questioned in any manner by the State of North Carolina other than the North Carolina courts placed upon the petitioners the burden of proving the good faith of their residence in the State of Nevada. In other words, the courts required the petitioners to prove themselves innocent, rather than requiring the State to prove them guilty. Such a position is contrary to Amendment V of the Constitution of the United States and to Article I, Section 11, of the North Carolina Constitution. This instruction extends the provisions of the statute and the judicial decrees of North Carolina to the State of Nevada and answers arbitrarily and negatively the legality of Nevada laws and that such extension of legislative power is unconstitutional under and by virtue of the provisions of the Fourteenth Amendment of the Constitution of the United States. The petitioners contend that this Court should so hold.

Discussion of Bell v. Bell

The opinion of the Supreme Court of North Carolina rendered on the second appeal in this case, as appears of record page 106, closes with the following statement:

> "From a legal standpoint, it all comes to this: On the first appeal the State relied on the case of Haddock *v.* Haddock. We were minded to follow that case. It was overruled by the Supreme Court of the United States. The State now relies on the case of Bell *v.* Bell (181 U. S. 175, 45 L. Ed. 804). We are disposed to follow this case."

The Supreme Court of North Carolina in its second opinion in this case, filed on April 12, 1944, relied upon

Bell v. *Bell, supra*, from which the said court imagined a proposition of law which in no wise existed in that case. In *Bell* v. *Bell* the proposition involved was a right of action *in personam* rather than a right of action *in rem*, which latter is the case of your petitioners. In *Bell* v. *Bell, supra*, the defendant had gone temporarily to Pennsylvania and instituted his divorce action in that State. He had then returned to New York State, the State of his navity, and a few weeks before securing his decree of divorce in the courts of Pennsyvania, he had filed with the probate court in New York State an affidavit for the purpose of obtaining the probate of a will wherein he stated that he was a citizen and resident of New York State. This evidence was adduced by the party attacking the Pennsylvania divorce decree and the court was properly justified in finding, upon such evidence, that the defendant had never been a resident of the State of Pennsylvania.

Exactly the contrary is true in the case at bar. Your petitioners offered evidence in the courts of Nevada as to their intention with respect to their domicile and upon that evidence the court adjudicated as a matter of fact that your petitioners were bona fide residents of the State of Nevada. The State of North Carolina on the first trial of this action and on the second trial of this action offered no evidence of any kind, character, or nature which challenged the adjudication of the question of fact as to the bona fides of your petitioners' residence in the State of Nevada.

It is a well recognized principle of law that the party attacking the adjudication of a court of competent jurisdiction in a foreign state must offer some competent evidence which would support such attack rather than the relying upon its own inferences which were the basis of the instructions to the jury to the effect that said judgment was a sham and a fraud. (See authorities cited supra).

Domicile.

North Carolina contends that notwithstanding the fact that it admitted on the previous hearing before the United States Supreme Court that there was sufficient evidence in the record to establish a colorable domicile by your petitioners in the State of Nevada, that it is not now bound by that admission and that it has the right to infer, from the record in this case, that the domicile was a sham and a fraud.

It is conceded that under Amendment XIV of the Constitution of the United States, that your petitioners are first citizens and residents of the United States and then of the state wherein they reside. Obviously, citizenship in the United States is paramount to citizenship of the individual states. Your petitioners complied with the state laws of the State of Nevada and were adjudged to be bona fide citizens of that State and this adjudication is not open to attack in the State of North Carolina. An opinion to the contrary would have the logical result of freezing the citizenship of the various forty-eight states and prevent a free migration from one state to the other.

With respect to the question of domicile, Section 6, page 11, of 28 C. J. S. holds as follows:

> "A domicile of choice is the place which a person has elected and chosen for himself to displace his previous domicile; it has for its true basis or foundation the intention of the person. A person having more than one residence may choose which of them shall be his domicile, and his choice is final if made in good faith, although he may spend less time at his domicile than at his other residence."

Likewise Section 9, page 11, is as follows:

> "Domicile of choice is entirely a question of residence and intention, or, as it is frequently put, of

factum and animus. To constitute such a domicile, or to effect a change of domicile, there must appear both an actual residence in a particular locality and an intention to remain there or to make it one's home, or, as frequently stated, the fact of residence and the intent to remain must concur, or be coupled, or be found together; and the same union of act and intent, or actual location in, or removal to, a particular place with intent to remain, has been required for "residence" or "legal residence", or a change thereof, in cases using those terms in the sense of domicile.

As soon as a point of time is reached when residence and intent concur, the domicile is obtained. It is not necessary that the intention to acquire a new domicile should exist at the time of removal, as the animus manendi may be formed afterward. Thus, if a person leaves his domicile, and while residing elsewhere forms an intention not to return, but to make his new residence his home permanently or for an indefinite period, he thereby acquires a new domicile."

In Section 10, same volume, page 14, defining what is necessary to establish a residence or domicile, the following is held to be the law:

"The physical character of the residence is of no importance in fixing the domicile, except as it may have a bearing on the question of intent, and it is immaterial whether the person lives in his own dwelling or in a hired house, or at a boarding house or hotel. Residence in some one particular house as a fixed place of abode is not essential.

A domicile may be any building or shelter used as a permanent residence, although not characterized by the usual appearance of a dwelling house or the ordinary comforts of a home. It may be a building detached from the principal residence, such as a dormitory for servants."

As between two residences, the place where a person sleeps may be determinative of his domicile.

"*Principal establishment.*" A statute fixing domicile at one's "principal establishment" means principal domestic establishment."

With respect to the length of duration, Sub-section b of Section 10, at page 14, is as follows:

"Except as the rule may be affected by statutory regulation, no particular period of residence or specified length of time in a particular place is required in order to establish a domicile, but when coupled with the element of intent to establish a domicile any residence, however short, will be sufficient, even if it is but for a day or an hour. Although a long-continued residence in one place has been regarded, in some decisions, as strong evidence, or even a controlling circumstance, in determining the question of domicile, residence alone, however long continued, will not establish domicile or effect a change of domicile, in absence of the requisite intention."

As to the meth l or purpose of establishing such residence or domicile, Sub-section c of Section 11, 28 C. J. S., page 17, provides as follows:

"If the requisite intention is shown to exist, the law will not, according to most authorities, scrutinize the motive or purpose prompting a change of domicile, however, some decisions have considered motive, particularly in determining whether the apparent intent was actual or merely pretended."

It is therefore respectfully submitted that under these authorities the State of North Carolina had no right, in the absence of positive proof, to assume or infer that the residences established in Nevada by your petitioners, and which residences had been adjudicated to be bona fide, were a sham and fraud in the absence of any evidence of any character whatsoever impeaching the judgments of the courts of the State of Nevada, adjudging your petitioners to be bona fide residents of said State.

The Court's Charge.

With respect to assignment of errors numbered 6 through 26, wherein the petitioners and each of them reserved exceptions to the charge of the court for the reason that the court placed upon the petitioners the burden of proving to the satisfaction of the jury the good faith of their residence in the State of Nevada, which instructions your petitioners believe is contrary to the provisions of the Constitution of the United States, as well as to the provisions of the Constitution of North Carolina.

Amendment V of the United States Constitution provides, among other things, as follows:

> "Nor shall (*any person*) (Itadies ours) be compelled in any criminal case to be a witness against himself."

Likewise, Article 1, Section 11, of the North Carolina Constitution provides as follows:

> "In all criminal prosecutions every man has the right to be informed of the accusation against him and to confront the accusers and witnesses with other testimony, and to have counsel for his defense, and not be compelled to give evidence against himself."

It is to be observed that with respect to the constitutional provisions of the North Carolina Constitution, your petitioners have never had the opportunity to confront any witnesses who challenged the bona fides of their residence and domicile in the State of Nevada, since there were no witnesses offered challenging the adjudication by the Nevada courts on the question of the good faith of their residence. Your petitioners assign as error the instructions of the court, as above referred to, as to this burden of proof, since if this be the law then the adjudication of a question of fact by a court of competent jurisdiction would be a complete nullity in every other state in the union except

where ajudicated, and it is conceivable that if that proposition be declared to be the law that your petitioners and other party, litigants might be compelled to re-litigate a question of fact which had been duly adjudicated in one state in every other state in the union to which they might perchance travel and thus there would be no end to litigation throughout the United States. Such is not the purpose of the law nor is it the purpose of the judicial system which has been developed through the years in this country. In the recent case of *Magnolia Petroleum Company v. Hunt*, supra, this court, speaking through Mr. Chief Justice Stone, held that facts once adjudicated by a court of competent jurisdiction was forever settled and was *res judicata* in every other state where the same may be brought into question.

Social Aspects of the Question Involved.

In *Vreeland* on "Validity of Foreign Divorce Decrees," 1938, at page 25, it is stated:

> "The question of divorce jurisdiction in the United States seems to be considered one of difficulty and confusion. While the more recent cases as a rule do not go deeply into the theory of the matter, not infrequently one sees articles and hears discussions stressing the complexity of the problem and ending with a statement to the effect that the Supreme Court of the United States should declare whether a divorce suit is *one in personam or in rem*."

The above quotation poses the question for this Court in the most apt language that the petitioners have been able to discover.

A decision by this Court sustaining the opinion of the Supreme Court of North Carolina would create havoc among literally thousands of married couples throughout the United States. To sustain this opinion can conceiv-

ably result in laws and judicial interpretation of laws in various states so that couples will be legally married in one state and living in adultery in all the other states to which they might perchance travel.

To sustain this opinion will completely upset property rights and the marital status of thousands of couples throughout the United States.

It is a matter of which the Court should take judicial notice that many people, there being no statutory prohibition, have established residences in states with the more liberal divorce laws and there obtained divorce and later remarried. Many children have been born to such unions and property rights have become vested by reason of the death of one or both of the parents and to sustain the opinion of the Supreme Court of North Carolina would not only declare illegal these marriages, but would bastardize the children born to said marriages and completely undermine the vested property rights of many American citizens who have been born, reared, and have inherited property from their respective parents under exactly the same situation as presented in the case at bar.

The State of North Carolina argues that it is against the public morals of said State to recognize the validity of a foreign divorce decree and many authorities are cited to that effect. The State of North Carolina, however, fails to recognize that in the cases cited by it, the question involved and litigated therein is a question *in personam* concerning which the foreign court did not attempt and could not litigate without jurisdiction of the right *in personam* by bringing both of the parties within the jurisdiction of the foreign court.

It is probably argued that the foreign court rendering the divorce decree could not acquire jurisdiction of the marital relationship unless both parties subjected themselves to the jurisdiction of the court rendering the decree.

This reasoning is fallacious in that the marital relationship is a status and that status accompanies each individual wherever that individual may establish a residence and it is not necessary therefore to have both parties within the jurisdiction of the court in order to adjudicate that status.

The anomaly of the situation is this. Suppose that two people from New York, Maryland, Virginia or any other State, had procured divorces in the State of Nevada, Arkansas, Virginia, or any other State in the Union, and had intermarried with each other and were traveling through North Carolina and perchance stopped at a hotel. Under the decision of the North Carolina Supreme Court such people might be indicted for bigamous cohabitation, and sentenced to serve a term in the State's Prison of North Carolina. Likewise persons who have been divorced and married under similar circumstances outside the State of North Carolina might perchance decide to establish permanent residence in North Carolina, and upon the establishment of such residence under North Carolina interpretation of the statute set forth in Appendix I, such persons could be indicted and convicted of bigamous cohabitation.

One of the questions, therefore, that this Court should consider most carefully with respect to public morals is whether or not it should declare illegal many thousands of marriages and bastardize many thousands of children when the children born of previous marriages cannot be affected by the decision of the court since they were born in lawful wedlock. WHY DESTROY THE LEGITIMACY AND PROPERTY RIGHTS OF CHILDREN BORN TO THE SECOND UNION WHEN SUCH DESTRUCTION WILL IN NO WISE ENHANCE THE RIGHTS OR PRIVILEGES OF CHILDREN BORN TO THE FIRST MARRIAGE?

Is it not better to recognize the validity of the foreign divorce decree and the foreign marriage, and thereforg,

maintain the integrity and union of thousands of homes as well as extend legitimacy and property rights of children born to the second marriage?

At the present time there are literally thousands of soldiers and defense workers located in camps and on defense projects in North Carolina, who have come from other States to the State of North Carolina, and certainly there are hundreds of them who have been divorced and remarried in other States, upon grounds which are not recognized by the laws of North Carolina. To enforce the interpretation placed upon Section 4342 of the North Carolina Code, that has been placed thereon by the Supreme Court of North Carolina, would subject every single couple living in North Carolina, and who came from outside the State, to indictment, conviction, and long prison terms under the alleged crime of bigamous cohabitation. Such a situation is intolerable for the reason that as has hereinbefore been stated, it would freeze the citizenship of the various States and prevent the free migration of citizens of the United States from one State to the other in normal times as well as in times of emergency, such as we are now facing.

It is therefore respectfully submitted by your petitioners that this honorable court should decree that a divorce action is one *in rem* because all of the States authorize service of summons by publication in divorce cases; that such action being on *in rem* service by publication or substituted service is valid and effective insofar as it affects the marital status and that the Nevada decrees involved in this controversy should be recognized by the State of North Carolina under the full faith and credit clause and other pertinent provisions of the Constitution of the United States, cited herein; it is further respectfully submitted that the State of North Carolina is bound by the decision of the United States Supreme Court in the former appeal in this identi-

cal case and that the Supreme Court of North Carolina was without authority to order a new trial of your petitioners when no error was assigned by the Supreme Court of the United States or by the North Carolina Supreme Court.

Your petitioners further respectfully submit that they having received a favorable decision at the hands of the United States Supreme Court on their former appeal that the same constitutes former jeopardy, could not legally be placed upon trial a second time for the identical crime upon the identical bill of indictment and with the identical evidence which had theretofore been adjudicated in this honorable Court.

WHEREFORE, your petitioners respectfully pray the court that the opinion of the North Carolina Supreme Court, rendered on their second appeal, be reversed and that your petitioners be set at liberty and that they have and recover the full cost of this second appeal.

Respectfully submitted,

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Attorney for Petitioners.

APPENDIX I.

Section 4342 of the North Carolina Code: If any person, being married shall marry any other person during the life of the former husband or wife, every such offender, and every person counseling, aiding or abetting such offender, shall be guilty of a felony, and shall be imprisoned in the state's prison or county jail for any term not less than four months nor more than ten years. Any such offense may be dealt with, tried, determined and punished in the county where the offender shall be apprehended, or be in custody, as if the offense had been actually committed in that county. If any person, being married, shall contract a marriage with any other person outside of this state, which marriage would be punishable as bigamous if contracted within this state, and shall thereafter cohabit with such person in this state, he shall be guilty of a felony and shall be punished as in cases of bigamy. Nothing contained in this section shall extend to any person marrying a second time, whose husband or wife shall have been continually absent from such person for the space of seven years then last past, and shall not have been known by such person to have been living within that time; *nor to any person who at the time of such second marriage shall have been lawfully divorced from the bond of the first marriage;* nor to any person whose former marriage shall have been declared void by the sentence of any court of competent jurisdiction.

APPENDIX II.

Section 484 of the North Carolina Code: Where the person on whom the service of the summons is to be made cannot, after due diligence, be found in the state, and that fact appears by affidavit to the satisfaction of the court, or a judge thereof and it in like manner appears that a cause of action exists against the defendant in respect to whom service is to be made, or that he is a proper party to an action relating to real property in this state, such court

or judge may grant an order that the service be made by publication of a notice in either of the following cases:

5—Where the action is for divorce.

APPENDIX III.

Nevada Law. Section 8582 Service of Process Outside of Nevada When By Publication.

Section 84: When the person on whom service is to be made resides out of the state, or has departed from the state, or cannot, after due diligence, be found within the state, or conceals himself to avoid the service of summons, and the fact shall appear, by affidavit, to the satisfaction of the court or judge thereof, and it shall appear, either by affidavit or by a verified complaint on file, that a cause of action exists against the defendant in respect to whom the service is to be made, or that he is a necessary or proper party to the action; such court or judge may grant an order that the service be made by the publication of the summons.

Provided, that when said affidavit is based on the fact that the party on whom service is to be made resides out of the state, it shall be a sufficient showing of such fact if the affiant shall state generally in such affidavit that at a previous time such person resided out of this state in a certain place (naming the place and stating the latest date known to affiant when such party so resided there); that such place is the last place in which said party resided to the knowledge of affiant; that such party no longer resides at such place; that affiant does not know the present place of residence of such party or where such party can be found; and that affiant does not know and has never been informed and has no reason to believe that such party now resides in this state; and, in such case, it shall be presumed that such party still resides and remains out of the state, and it shall not be necessary to use due or any diligence to find such party in this State, or to show by affidavit that due or any diligence was so used. As Amended, Stats., 1923, 275.

Section 2. Section 85 of an act entitled "An act to regulate proceedings in civil cases in this State, and to repeal all other acts in relation thereto," approved March 17, 1911, is hereby amended so as to read as follows:

Section 85: The order shall direct the publication to be thereof, for a period of four weeks, and at least once a week during said time. In case of publication, where the residence of a nonresident or absent defendant is known, the court or judge shall also direct a copy of the summons and complaint to be deposited in the post office directed to the person to be served at his place of residence. When publication is ordered, personal service of a copy of the summons and complaint, out of the state, shall be equivalent to completed service by publication and deposit in the post office, and the person so served shall have thirty days after said service to appear and answer or demur. The service of the summons shall be deemed complete in cases of publication at the expiration of four weeks from the first publication, and in cases when a deposit of a copy of the summons and complaint in the post office is also required, at the expiration of four weeks from such deposit. As Amended Stats. 1931; 159.